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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re S.M. et al., Persons Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

KATHLEEN W.,

Defendant and Appellant.

D060927

(Super. Ct. No. J510455G-I)

APPEAL from a judgment of the Superior Court of San Diego County, Laura J.
Birkmeyer, Judge. Affirmed.

Kathleen W. appeals the judgment terminating her parental rights to her son, S.M.
and her daughters, Summer M. and Samantha M. (together, the children). Kathleen
contends the juvenile court erred by declining to apply the beneficial relationship and

sibling relationship exceptions (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i), (v))¹ to termination of her parental rights. We affirm.

BACKGROUND

Kathleen has a history of substance abuse and involvement in violent relationships. In 1994, when she was 16 years old, she gave birth to her first child, and her extensive child welfare history began. By 2007, Kathleen had given birth to six more children. Her parental rights to four of those children were terminated, and one child was placed in a legal guardianship. The whereabouts of the sixth child were unknown; Kathleen said she believed that child had been adopted by a paternal relative.

A May 2000 psychological evaluation concluded Kathleen suffered from dependent personality disorder and borderline intellectual functioning. She had limited capacity to care for a young child, limited coping skills and poor insight. A second evaluation conducted nearly 11 years later diagnosed a dependent personality disorder, and noted below average intellectual functioning and very poor judgment and insight. The second evaluation concluded Kathleen was more interested in her own needs than those of the children.

THE DEPENDENCIES

S.M. was born in July 2008, and Summer was born in July 2009. In February 2010, the San Diego County Health and Human Services Agency (the Agency) filed dependency petitions for one-and-one-half-year-old S.M. and six-month-old Summer.

¹ All further statutory references are to the Welfare and Institutions Code.

The petitions alleged Kathleen had lost permanent custody of six other children. Additionally, S.M. and Summer were exposed to violent confrontations between their father, David M., and David's ex-wife, Janet T. In the presence of S.M. and Summer, David punched three holes in a wall, pulled out a thermostat, twisted Janet's hand and broke the telephone when she tried to call 911. Kathleen was present and minimized David's violence.

S.M. and Summer were detained in the home of nonrelative extended family members who had adopted four of their siblings. In March 2010, the court entered true findings on the petitions, ordered S.M. and Summer placed in the home of the nonrelative extended family members and ordered reunification services.

In July 2010, Kathleen gave birth to her 10th child, Samantha, and the Agency filed a dependency petition. The petition, as later amended, alleged that between 1999 and 2009, Kathleen failed to reunify with seven other children due to domestic violence and failure to supervise and provide for those children. Kathleen qualified for Regional Center services but refused to participate. David had a long history of domestic violence, including the incident alleged in S.M.'s and Summer's petitions. David had at least six prior arrests for domestic violence and had not received treatment. Despite this, Kathleen continued to have contact with him, and reported living with him until January 2010. They visited Samantha's siblings together, and together attended a meeting with Agency

personnel. During that meeting, David appeared to be under the influence of drugs or alcohol.²

Samantha suffered from respiratory distress and remained in the neonatal intensive care unit for several days. Upon her release from the hospital, she was detained in a foster home.³ In August 2010, the court entered a true finding on Samantha's petition, ordered her placed in foster care and ordered reunification services. In September Samantha was moved to a new foster home.

In April 2011, at the 12-month review hearing for S.M. and Summer and the six-month review hearing for Samantha, the court terminated reunification services and set a section 366.26 hearing. In October, the court terminated parental rights. At the time of the section 366.26 hearing, Kathleen was pregnant with her 11th child.

THE BENEFICIAL RELATIONSHIP EXCEPTION

If a dependent child is adoptable,⁴ the juvenile court must terminate parental rights at the section 366.26 hearing unless the parent proves the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W.* (2007) 150 Cal.App.4th 71, 80-81.) One such exception exists if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26,

² Samantha's petition listed David as her alleged father. In February 2011, the court struck David's name from the petition and entered a judgment of nonpaternity. The identity of Samantha's father was never discovered.

³ The nonrelative extended family members who were caring for S.M. and Summer were unable to care for an additional child.

⁴ Kathleen does not contest the adoptability findings.

subd. (c)(1)(B)(i).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) If terminating parental rights "would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome" (*Ibid.*) The existence of a beneficial relationship is determined by "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs" (*Id.* at p. 576.) Here, the court found Kathleen had maintained regular visitation and contact. Examining the evidence in the light most favorable to the judgment (*ibid.*), we conclude substantial evidence supports the court's conclusion that Kathleen failed to show the benefits to the children of maintaining their relationship outweighed the benefits of adoption.

At the time of the section 366.26 hearing, S.M. was three years old and Summer was two years old. They had been out of Kathleen's care for approximately one year nine months. Their caregivers, with whom they had lived since the beginning of this case, wished to adopt them.

One-year-old Samantha had never been in Kathleen's care. She had lived for all but the first two months of her life with a foster parent who wished to adopt her. Samantha was developmentally delayed, but had progressed markedly with her foster parent's help.

The children were flourishing in their placements and attached to their caregivers. The social worker believed the children did not have a parent-child relationship with Kathleen,⁵ and needed the consistency, structure, stability and permanency that adoption would provide.

Kathleen did not ask for more visits, inquire about the children's well-being between visits or ask to attend the children's doctors' appointments. Visits were always supervised or monitored. At the beginning of visits, S.M. and Summer usually ran to the visitation monitors before greeting Kathleen. Kathleen brought food, clothing, videos and toys to the visits. She played with S.M. and Summer, and they enjoyed the visits. Kathleen was sometimes appropriate, but did not enforce her directives and was sometimes inattentive to the children's safety. At a visit in late 2010, David pushed Kathleen while she was holding Summer. To prevent David from hitting her, Kathleen used Summer as a shield.

During visits, Kathleen focused on Summer to the exclusion of S.M. and Samantha. Kathleen left Samantha in a "bouncer/walker" for long periods, despite being told repeatedly that Samantha's feet could not bear the weight. Kathleen acknowledged she did not have a bond with Samantha and said she did not want to form one. S.M. did not interact much with Kathleen and rebuffed her attempts to interact with him. Summer

⁵ Kathleen suggests the sole reason for the social worker's belief was the fact that Kathleen did not meet the children's daily needs. That was just one reason the social worker cited; she also cited many more.

was the only one of the children who showed an attachment to Kathleen. The children separated easily from Kathleen at the close of visits.

Substantial evidence supports the conclusion that the children's relationship with Kathleen did not promote the children's "well-being . . . to such a degree as to outweigh the well-being [they] would gain" by being adopted.⁶ (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

THE SIBLING RELATIONSHIP EXCEPTION

Section 366.26, subdivision (c)(1)(B)(v) provides an exception to termination of parental rights when termination would substantially interfere with the child's sibling relationship and the severance of the relationship would be so detrimental to the child as to outweigh the benefits of adoption. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951-953; § 366.26, subd. (c)(1)(B)(v).) The juvenile court must "balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer." (*In re L.Y.L.*, at p. 951, citing *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Factors to be considered in determining whether this

⁶ Kathleen relies on *In re S.B.* (2008) 164 Cal.App.4th 289 and *In re Brandon C.* (1999) 71 Cal.App.4th 1530. *In re S.B.* is factually distinguishable. There, the appellant father " 'complied with every aspect of his case plan' " (*In re S.B.*, at pp. 293, 298), empathized with his child, recognized her needs (*id.* at p. 294) and placed her needs above his own (*id.* at p. 298). The child displayed a strong attachment to the father (*id.* at p. 298), "became upset when the visits ended and wanted to leave with [him]" (*id.* at p. 294). They "had an emotionally significant relationship." (*Id.* at p. 298.) *In re Brandon C.* is legally distinguishable. There, the reviewing court concluded there was substantial evidence to support the application of the beneficial relationship exception. (*In re Brandon C.*, at p. 1530.)

exception applies include whether the siblings were raised in the same home; whether they shared significant common experiences or have existing close and strong bonds; and whether ongoing contact is in the child's best interests, including his or her long-term emotional interests, as compared to the benefit of adoption. (§ 366.26, subd. (c)(1)(B)(v).) "[T]he application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount." (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014.) Examining the evidence in the light most favorable to the judgment, we conclude substantial evidence supports the conclusion Kathleen did not meet her burden of proving the exception.⁷ (*In re L.Y.L.*, at pp. 947, 952.)

Samantha had never lived with S.M. and Summer. S.M. and Summer's first contact with Samantha was in December 2010, when Samantha was barely five months old. The only such contact was at visits, during which S.M. and Summer did not interact with Samantha much. As noted above, the children were attached to their caregivers, their caregivers wanted to adopt them and the social worker believed the children needed the benefits of adoption. S.M. and Summer were in the same placement, and their caregivers and Samantha's foster parent were open to maintaining contact with one another.

⁷ Kathleen asserts the exception applies to the children's relationship with each other. The court also found the exception did not apply to the children's relationship with their other siblings.

Kathleen relies on *In re Naomi P.* (2005) 132 Cal.App.4th 808. That case is legally and factually distinguishable. In *In re Naomi P.*, the reviewing court affirmed the application of the sibling relationship exception, and there was "powerful demonstrative evidence," in the form of testimony by the siblings, "that it would be in Naomi's best interest to ensure continuation of the relationship." (*Id.* at pp. 824, 823.)

Substantial evidence supports the conclusion that even if termination of parental rights were to substantially interfere with the sibling relationships, this would not be so detrimental to the children as to outweigh the benefits they would achieve through adoption.

DISPOSITION

The judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.